United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7510

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant,
(Docket No. 76-7510)

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant, (Docket No. 76-7562)

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

BP/S

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT

This appeal by plaintiff-appellant cargo owner, (hereinafter designated as plaintiff-consignee), is from a final judgment for cargo loss entered in an admiralty action on October 13, 1976 (34a) by Judge Goettel in the Southern District of New York, which was heard by the United States Court of Appeals and remanded to the District Court by Order dated June 20, 1978 for additional findings. The District Court filed its opinion, so ordered, on August 30, 1978, with additional findings, having received no additional evidence.

Plaintiff-consignee is appealing this opinion filed as ordered as well as the judgment entered in October of 1976.

FACTS

The facts are set forth in detail in plaintiff-consignee's original brief to the United States Court of Appeals. The controversy basically relates to the shipment of a crate containing a generator to be transported on an ocean going vessel. Although not loaded on board, the steamship company issued an "on board" bill of lading. This bill of lading was negotiated against plaintiff-consignee's irrevocable letter of credit. Had the bill of lading not been stamped with the "on board" stamp, the letter of credit would not have been honored.

The one crate containing the generator was never delivered to the consignee nor was there any evidence at the trial that it was ever found. The District Court directed the entry of judgment in favor of the plaintiff-consignee for the loss, but limited recovery to $500.00 pursuant to the terms of the bill of lading.

Plaintiff-consignee directed its original appeal solely to that part of the judgment which limits its recovery against the defendant to the sum of $500.00.

The Court of Appeals in its opinion of June 20, 1978 sua sponte raised the issue whether the Pomerene Bills of

Lading Act, 49 U.S.C. §81 et seq. was applicable to the circumstances of this case and remanded the case to the District Court to determine whether the Act applied and, if it did, whether the recovery under that section is affected by the $500.00 per package COGSA limitation.

The case was also remanded for "a specific finding, preferably based on more substantial evidence than an unsigned tally (should it exist), on whether the missing crate was actually loaded on board another vessel".

The District Court, having received no additional evidence either in the form of documents or testimony, issued an opinion in which it stated: "Throughout the trial and after invitations from both the Court of Appeals and this Court, the parties have been unable to produce any more probative evidence on the issue. While this is a source of frustration, apparently the parties did not keep records with the possibility of litigation in mind". The District Court went on to additional speculation and inferences on points which were never the subject of any testimony or evidence. Upon this speculation and inferences the District Court came to the conclusion that the crate had been loaded on board another vessel which sailed earlier. It is interesting to note that the crate was never discharged from this vessel.

Plaintiff now appeals not only the earlier judgment which limits plaintiff's recovery to $500.00, but also the

erroneous conclusions found by the District Court on the remand.

QUESTIONS PRESENTED

1. The basic question presented to this Court is: Did the District Court err in limiting the recovery against the defendant to $500.00 in view of the fact that an erroneous bill of lading was negotiated against a letter of credit to the detriment of plaintiff-consignee?

2. Do such findings as the District Court made on remand, (whether erroneous or not), in any way effect plaintiff's right to recover in full?

POINT I

An ocean carrier issuing a bill of lading with false information in order that the bill of lading may be negotiated through a bank to the detriment of a third party may not rely on the defense contained therein.

Plaintiff-consignee reaffirms its position that the District Court erred in its original decision for the reasons set forth in Point I of its original appellate brief and this still remains the plaintiff's basic contention.

With respect to the issue related to this point as brought up sua sponte by the Court of Appeals as to the relationship of the Pomerene Bills of Lading Act, it is plaintiff-consignee's position that the District Court erred

in its findings in reply to the Court of Appeals.

Though the Distict Court cited Section 22 of the Pomerene Act (49 U.S.C. §102), it is noteworthy that the very portion of the section which plaintiff had underscored in its letter-brief to the Court of Appeals dated May 24, 1978 was replaced with ". . . " in the District Court's opinion on remand (P. 2). For the sake of clarity, the section is set forth as follows:

> "if a bill of lading has been issued by the carrier, the carrier shall be liable to ***
>
> (b) the holder of an order bill of lading who has given value in good faith relying upon the description therein of the goods, or upon the shipment being made upon the date shown for damages caused by the non-receipt by the carrier of all or part of the goods upon or prior to the date therein shown ***". (underscoring ours).

There was evidence given at the trial that clearly established that the shipment was not loaded on the date shown. In fact, the stevedore's records reveal that only eleven cartons were loaded and this over a three-day period commencing on that date (9a). There was also evidence at the trial that although eleven items were shipped, twelve were set forth on the bill of lading issued.

The Court of Appeals in its June 20th decision indicated that the applicability of the Act may still depend upon:

a. If Elgie & Company relied upon the alleged mis-description of the goods in the bill of lading issued by South African Marine Corporation Ltd.

b. Whether the damages suffered by appellant were caused by such mis-description.

The answer, from the evidence at trial is clearly in the affirmative in both instances.

When plaintiff Elgie & Company arranged to have an irrevocable letter of guarantee issued through the bank, its only protection was requiring an on board bill of lading to be presented with the documents. This, in effect, would prevent plaintiff from giving up its money for cargo which did not exist at the time. By placing the words "on board" on the bill of lading and setting forth the date, when this was not in fact so, the South African Marine Corporation Ltd. caused the plaintiff-consignee to pay $10,559.49 for cargo which was not on board the vessel and for which South African Marine Corporation Ltd. wishes to give plaintiff $500.00. The fact that the ocean carrier may have placed the stamp on the bill of lading through neglect rather than design does not distract from the fact that the words "on board" are very significant and a specific requirement of the irrevocable letter of credit. Constructive fraud does not require

intent to deceive. Liability for constructive fraud may be based on a negligent or even innocent misrepresentation. U.S. FIBRES, INC. v. PROCTOR & SCHWARTZ, INC., 358 F. Supp 449, 460 affd. 509 F2d 1043 (6th Cir. 1975).

The Pomerene Act was intended to protect one who in reliance on the recitals of the bill of lading had acquired the same, or the property represented thereby, for value or who had otherwise altered his position to his detriment by reason thereof. STROHMEYER & ARPE CO., v. AMERICAN LINE SS CORP., et al., 97 Fed. 2D 360, 362 (2nd Cir. 1938).

POINT II

The District Court's finding that the cargo had been laden on board an earlier vessel is clearly erroneous.

In Point II of plaintiff-consignee's earlier appeal brief it discussed the importance of an on board endorsement on the bill of lading. The District Court had found that "one large crate was probably loaded upon the Morgenster". The Appeals Court asked if this constituted a factual finding of the Court. The lower court replied that "in the techincal sense of being necessary to support the decision below, it was not". (p. 8). The District Court then gives a conclusion which is completely erroneous. With no additonal documentation or testimony or evidence of any other sort, it concluded that the missing crate containing the generator was loaded

upon the SS "MORGENSTER" based on the following facts:

> "1. The crate, along with the other parts, was delivered to the pier March 13, 1974, and was receipted for under dock receipt 207. (See footnote 5, original opinion)".

This certainly is not a fact upon which it could be concluded that it was loaded on the SS "MORGENSTER".

> "2. The crate was too large to be pilfered".

There was no testimony at the trial that the crate was too large to be pilfered, nor was there any testimony by any expert as to the limitations of size of items being taken from the New York piers. It is believed that the Court could take judicial notice of the fact that entire containers and truck loads have been taken from the piers from time to time. At any rate, it did not outturn off the SS "MORGENSTER", and it certainly could not have been pilfered from the vessel while it was at sea if it were too large to be pilfered off the dock.

> "3. The crate was of such a unique and limited use (the grinding of optical curves) that it is unlikely that anyone would have contrived to have it stolen using a large vehicle".

There was no evidence given at trial as to the uniqueness of this machine or the lack of desire of anyone to contrive to have it stolen. The machine is used to grind

lenses for eyeglasses. It is an expensive machine and there is no basis for concluding that it is inherently immune from theft.

> "4. The crate was sufficiently large that, if it had been accidentally dropped overboard during the loading, this would have been noted and remembered".

Whether anybody noted the crate's falling overboard or into the water at anytime was not discussed or testified to at the trial. There was neither affirmative or negative testimony.

> "5. In addition to the tally sheet indication that one package from the shipment was loaded on the Morgenster, the testimony of the checker was that he had no question in his mind that the piece had gone aboard the Morgenster. (Record 430a).

In this respect, the witness said he could testify only from the tally, not from his memory (Tr. 432a). He conceded that the cargo was only tallied on the pier as it moved from the bay to the stringpiece (Tr. 453a), and that "there is always the possibility of cargo being taken out by a hi-lo from the bay and then never actually hoisted aboard" (Tr. 436a). His superior, the Pier Superintendent, conceded during cross-examination that he could not tell from these tallies what was put on the ship (Tr. 364a). In addition, as the Trial Judge noted, the tally is not in

accord with the hatch plan, and refers to "parts" when the crate in question contained a "generator". (Tr 378a).

> "6. A written notation on the ocean carrier's dock receipt indicated that "Anthony" had advised that he then had stowage for only eleven pieces. (See footnote 9 of the Court's original opinion)".

There was no testimony given on the meaning of Anthony's remarks. Certainly, it is not conclusive that the crate had been loaded on the SS "MORGENSTER".

> "7. The stevedore's records revealed that only cartons were loaded aboard the S. A. Nederburg. (See footnote 5 original opinion)".

All are in agreement that only eleven cartons were loaded aboard the S. A. NEDERBURG, but a bill of lading was issued for twelve and this is what the trial was about and what the appeal is about. The District Court then states that "since the missing crate left the pier during the ten-day period in the middle of March", (although there was no evidence given to this fact), "during which the Morgenster sailed there is no other reasonable explanation for where it went".

It is plaintiff-consignee's position that the District Court's conclusion is clearly erroneous, in that none of it is based upon fact or evidence. It is a conclusion drawn upon erroneous speculation. The District Court having taken the position that it was only "probably loaded", cannot reach the conclusion that it was loaded without additional evidence.

A mere possibility, however, is not sufficient and the finding must be disregarded as not supported by the evidence. J. GERBER & COMPANY v. SS "SABING HOWALDT", 437 Fed. 2d 580, 592. (2nd Cir. 1971). The record discloses nothing to justify the conclusion that the crate was in fact loaded aboard the MORGENSTER. The Appellate Court on review is in as good a position as the Trial Court to examine, interpret and draw inferences from testimony. J. GERBER & COMPANY v. SS "SABINE HOWALDT", supra at page 586. The findings of the Trial Court are not supported by the record and its factual conclusions unavoidably leave the "definite and firm conviction that a mistake has been committed" and thus are clearly erroneous. UNITED STATES v. UNITED STATES GYPSUM CO., 333 U.S. 364, 395, 68 S.Ct. 525, 92L.Ed 746 (1948) The fact is that the crate was not laden aboard the SS "S.A. NEDERBURG" for which an "on board" bill of lading was issued. This bill of lading was false and plaintiff-consignee relied upon it to its detriment.

CONCLUSION

The Ocean carrier, having issued a bill of lading with an erroneous "on board" endorsement, knowing that such a bill of lading would be negotiated through the bank to a third-party relying on such endorsement to his detriment, may not use the defense of limitation of liability in the bill of lading.

The additional findings of the District Court which are clearly erroneous and not supported by the evidence, do not modify this in any way. The plaintiff-consignee is entitled to recover in full for the non-delivery of its cargo.

Respectfully submitted,

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